DENIED Oct 20 1925

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. 4[redacted]61 22

POSTUM CEREAL COMPANY, INC.,
PETITIONER,

v.

CALIFORNIA FIG-NUT COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FRANK F. REED,
EDWARD S. ROGERS,
WM. J. HEBERER,
Of Counsel.

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POSTUM CEREAL COMPANY, INC.,
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v.

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Postum Cereal Company, Inc., submits its petition for a writ of certiorari to the Court of Appeals of the District of Columbia to review a decision of that court in the above-entitled cause.

The Question Involved.

The sole question is whether the Court of Appeals, under the Trade-mark Act of March 19, 1920, has jurisdiction to review a decision of the Commissioner of Patents denying a petition to cancel the registration of a trade-mark.

The Facts.

This proceeding was instituted by a petition in the United States Patent Office under the Trade-mark Act of March 19, 1920 (41 Stat. 533) to cancel the registration of the word "Fig-Nuts" as a trade-mark for a breakfast cereal, on the ground that "Fig-Nuts" infringes petitioner's well known and valuable trade-mark "Grape-Nuts," long previously owned, in use, and registered by petitioner as a trade-mark for similar merchandise.

Answer was filed and testimony taken. The petition was dismissed by the Commissioner of Patents and a petition for rehearing denied. From the decision of the Commissioner, an appeal was taken to the Court of Appeals.

The Decision Below.

The appeal to the Court of Appeals was dismissed, the court holding that it had no jurisdiction to entertain an appeal from the Commissioner of

Patents in a trade-mark case arising under the Trade-Mark Act of March 19, 1920.

The Court of Appeals followed its decision in *United States Compression Inner Tube Co.* v. *Climax Rubber Co.* (53 App. D. C. 370; 290 F. R. 345). In that case it held that as the enumeration in Section 6 of the Act of 1920, of various sections of the Act of 1905, "made applicable to marks placed on the register provided for by Section 1 of this act" *omitted Section 9* of the Act of 1905, and as Section 9 related to appeals from the Commissioner of Patents to the Court of Appeals, no right of appeal is now given by this statute.

The Statutes Involved.

The statutes involved are Section 1 (*b*) of the Trade-mark Act of March 19, 1920 (41 Stat. 533), which is as follows:

> "That trade-marks which are identical with a known trade-mark owned and used in interstate and foreign commerce, or commerce with the Indian tribes, by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be placed on this register."

Section 6 of the same act, which reads:

> "That the provisions of sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, and 28 (as to

class (*b*) marks only) of the Act approved February 20, 1905, entitled 'An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States, or with Indian tribes, and to protect the same,' as amended to date, and the provisions of section 2 of the Act entitled 'An Act to amend the laws of the United States relating to the registration of trade-marks,' approved May 4, 1906, are hereby made applicable to marks placed on the register provided for by section 1 of this Act;"

and Section 9 of the Act of February 20, 1905 (33 Stat. 727), which reads:

"That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable."

Reasons for Granting the Writ.

(1) Certiorari is the proper method, in the opinion of counsel, by which the question of jurisdiction involved can be determined, and it is the first time it has come before this court. Out of abundance of caution, however, application for an appeal has also been made.

(2) It necessarily results from the decision of the Court of Appeals that (as hereinafter shown), judicial review of the decision of the Commissioner of Patents cannot be had under Section 4915 of the Revised Statutes, or otherwise.

(3) In the very important class of trade-mark cases like the present, there exists, under the decision sought to be reviewed, a *hiatus* in the law—that is, there is no means provided by which parties to proceedings to cancel the registration of trademarks under the Act of March 19, 1920, can obtain judicial review of the decisions of the Commissioner of Patents—the only cases in which the decision of an administrative or quasi judicial officer is not subject to review by *any* court, and is a departure from a settled policy of long standing.

(4) The court held that the right of appeal was abolished by implication, contrary to the rule laid down by this court in *Craig* v. *Hecht,* 263 U. S. 255, discussed *infra.*

Wherefore, petitioner prays that a writ of certiorari issue to the Court of Appeals of the District of Columbia to review its decree in the cause.

Counsel for petitioner are authorized to say that while opposing counsel of course does not agree that either the action of the Commissioner of Patents or of the Court of Appeals is erroneous, he regards the question whether the Court of Appeals has jurisdiction over decisions of the Commissioner of Patents in trade-mark cases arising under the Act of March 19, 1920, as of great public importance in the administration of the trade-mark laws, and sufficient, as petitioner submits, to justify review by this Court.

Respectfully,

POSTUM CEREAL CO., INC.,
By JOHN S. PRESCOTT,
Secretary.

STATE OF NEW YORK,
County of New York, ss:

Comes now John S. Prescott, and being duly sworn deposes and says that he is the secretary of the petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason why this verification is not made by

petitioner is that the petitioner is a corporation; that as to all matters not stated on affiant's own knowledge, the source of his information and the grounds of his belief are the records and papers of the petitioner in affiant's possession and control.

JOHN S. PRESCOTT.

Sworn to before me this 28th day of June, 1924.

BELLA STAATS TOBISON,
Notary Public.

[SEAL.]

We hereby certify that we have examined and read the foregoing petition for a writ of certiorari and that in our opinion such petition is well founded and should be granted by this Court, and that such petition is not filed for delay.

FRANK F. REED.
EDWARD S. ROGERS.

WM. J. HUGHES,
Of Counsel.

JUNE, 1924.

BRIEF IN SUPPORT OF PETITION.

I.

The question whether the Court of Appeals of the District of Columbia has jurisdiction to review decisions of the Commissioner of Patents in proceedings to cancel the registration of trade-marks under the Act of March 19, 1920, is even broader than hereinbefore stated, because, from the decision of that court in the instant case, it necessarily follows that the decision of the Commissioner is not subject to review in *any* court. This is so because Section 9 of the Act of 1905 specifies the *only* means by which decisions of the Commissioner may be reviewed—that is by appeal to the Court of Appeals, (or by a proceeding under R. S. U. S. 4915). This Court held in *American Steel Foundries* v. *Robertson* (262 U. S. 209), that Section 4915 of the Revised Statutes, authorizing the filing of a bill to review decisions of the Commissioner of Patents in *patent* cases, applied also in *trade-mark* cases under the Act of 1905, following *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35; *Atkins & Co.* v. *Moore*, 212 U. S. 285; *Gaines* v. *Knecht*, 212 U. S. 561. This view was reaffirmed as recently as May 26, 1924, in *The Baldwin Company* v. *Robertson* (No. 251, October Term, 1923). If the Act of 1905 is *superseded* by the Act of 1920, and if the latter Act has not had carried into it the provision of the earlier

act upon which the right conferred by Section 4915, R. S., rested, it follows that bills in equity will not lie in such cases, and there is no way to obtain judicial review of a decision of the Commissioner of Patents in any trade-mark case. And manifestly, if the decision below be correct, a bill under R. S. U. S. 4915, will not lie in cases arising under the Act of 1920, because the basis of such a proceeding is found, not in that act, but in Section 9 of the Act of 1905. It follows then that parties to such proceedings are deprived of all access to the courts.

II.

The Court of Appeals by its decision in the instant case has held, in substance, that Congress has by *implication* taken away a right of appeal which has always existed heretofore in cases like this.

The analogy between trade-mark cases and patent cases has been observed by this Court in *American Steel Foundries* v. *Robertson* (262 U. S. 209), where Mr. Chief Justice Taft said:

> It is obvious from that Section and the whole of the Trade-mark Act that Congress intended to produce a parallelism in the mode of securing these two kinds of Government monopolies from the Patent Office.

This parallelism must, we think, be considered in determining the intent of Congress. It seems to have been lost sight of by the Court of Appeals. It appears to us that that court should not have been

satisfied with an inference as a basis for holding that Congress intended to take away a right of appeal, which has been the common practice in like cases for many years.

In this connection the language of this Court in *Craig* v. *Hecht* (263 U. S. 255), is appropriate:

> If it (Congress) had intended to abolish the right of appeal * * * it would doubtless have done so in plain and direct terms. The fact that the right of appeal was not thus abolished furnishes a persuasive inference that Congress intended to designate a court to hear and determine such appeals.

The Court of Appeals of the District of Columbia has been the court which, since its organization, has been designated by Congress to hear and determine appeals from decisions of the Commissioner of Patents. It is submitted that it was the intention of Congress, in giving effect to the Argentine Conference, to make the Act of March 19, 1920, *a supplement to*, and not *a substitute for*, the Act of February 20, 1905. The cases arising under the Act of 1920 are numerous. The rights and interests involved are important. An intention to make such a far-reaching change in policy affecting enormously valuable rights should not be imputed to Congress unless such intention is clear. The right of the citizen to have review in the courts of the action of administrative and *quasi-judicial* officers should be maintained unless Congress has clearly

shown an intention to the contrary, and this, we submit, it has not done.

FRANK F. REED.
EDWARD S. ROGERS.

WM. J. HUGHES,
Of Counsel.

JUNE —, 1924.